

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA, )

4 Plaintiff, )

5 v. )

6 REAZ QADIR KHAN, )

7 Defendant. )

No. 3:12-cr-00659-MO

November 7, 2014

Portland, Oregon

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15 **Oral Argument**

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MICHAEL W. MOSMAN

18 UNITED STATES DISTRICT COURT JUDGE  
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APPEARANCES

FOR THE PLAINTIFF: Mr. Ethan D. Knight  
Mr. Charles F. Gorder, Jr.  
United States Attorney's Office  
1000 S.W. Third Avenue, Suite 600  
Portland, OR 97204

FOR THE DEFENDANT: Ms. Amy M. Baggio  
Baggio Law  
621 S.W. Morrison, Suite 1025  
Portland, OR 97205

Mr. John S. Ransom  
Ransom Blackman, LLP  
1001 S.W. Fifth Avenue, Suite 1400  
Portland, OR 97204

Mr. Ryan O'Connor  
O'Connor Weber LLP  
522 S.W. Fifth Avenue, Suite 1125  
Portland, OR 97204

COURT REPORTER: Bonita J. Shumway, CSR, RMR, CRR  
United States District Courthouse  
1000 S.W. Third Ave., Room 301  
Portland, OR 97204  
(503) 326-8188

## (P R O C E E D I N G S)

MR. KNIGHT: Good morning, Your Honor. We're present in the matter of the United States v. Reaz Khan. This is Case No. 12-cr-659. Ethan Knight and Charles Gorder appearing on behalf of the United States. Jack Ransom, Ryan O'Connor and Amy Baggio are appearing on behalf of the defendant, who is present and out of custody. And we're here today, Your Honor, on a number of defendant's motions that are before the Court.

THE COURT: Thank you.

Ms. Baggio, are you prepared to proceed?

MS. BAGGIO: Thank you, Your Honor. I am.

Your Honor, with the Court's permission, we would suggest the order as displayed on your screen right now. We would like to begin with the motion to dismiss indictment, which I'll be arguing, followed by the defense motion for a bill of particulars by Mr. Ransom -- I'm sorry, the motion to strike surplusage. It says me, but it's actually Mr. Ransom as well. And with the Court's permission, Ryan O'Connor would argue the motion related to the defense request for a jury instruction. I have cleared this with Mr. Khan, he has no objection to that, but with the Court's permission, Mr. O'Connor would offer that argument.

And then we have two motions in limine pending today, one that Mr. Ransom filed and one that I filed with

1 regard to the email.

2 THE COURT: That's fine.

3 MS. BAGGIO: Thank you.

4 THE COURT: Mr. O'Connor, have we met before?

5 MR. O'CONNOR: We have not, Your Honor.

6 THE COURT: Just give me a brief bio so I knew who  
7 you are and where you are from.

8 MR. RANSOM: Sure. I attended the University of  
9 Portland here in town, undergrad; went to law school at the  
10 University of Notre Dame. I worked at the State Public  
11 Defender's Office in Salem doing appeals for several years,  
12 and now I'm in private practice here in Portland.

13 THE COURT: With?

14 MS. BAGGIO: With my own firm, O'Connor Weber.

15 THE COURT: All right. Thank you very much.

16 Welcome.

17 MR. O'CONNOR: Thank you.

18 THE COURT: Ms. Baggio, go ahead.

19 MS. BAGGIO: Thank you, Your Honor.

20 Your Honor, as I stated, I'd like to begin with  
21 the motion to dismiss the indictment, and I put together a  
22 PowerPoint to try to organize my thoughts on this, and of  
23 course wherever the Court wants to go, we'll go, but I  
24 thought this could be one way to proceed.

25 Your Honor, we raised three issues as to the

1 indictment in our motion to dismiss: First, the general  
2 vagueness in the indictment; secondly, we argue that the  
3 indictment impermissibly charges a double-layered  
4 conspiracy; and lastly that it's vague as to the applicable  
5 maximum punishment.

6 I'll start with the basic premise regarding a  
7 material support case. 2339A criminalizes the material  
8 support intending to further one of any of over 40 different  
9 offenses. And I think this is a very important point for me  
10 to make here this morning, Your Honor. The material support  
11 statute does not criminalize material support offered in  
12 furtherance of some other conduct that's not delineated or  
13 cross-referenced by material support statutes.

14 And as we address in our briefing as to the jury  
15 instruction and mens rea as to the jury instruction, the  
16 government needs to prove beyond a reasonable doubt that  
17 Mr. Khan knew and intended, in providing the support, that  
18 it would further the separate 956 conspiracy that's  
19 cross-referenced in the indictment.

20 When I look at the indictment in this case, I see  
21 at least two possible conspiracies that we're talking about  
22 here. The first, which is consistent with the indictment,  
23 that the government alleges Mr. Khan and Ali Jaleel  
24 conspired to provide support to others. And the indictment  
25 doesn't state who, where, when, or those specifics, but that

1 Mr. Khan and Mr. Jaleel together provided that support,  
2 knowing and intending that those others would then engage in  
3 a conspiracy to kill overseas. And that, as I said, is  
4 consistent with the indictment, which says "conspired with  
5 Ali Jaleel."

6 And we compare this to another way possible way of  
7 reading the indictment, or at least the way the government  
8 appears to be interpreting its indictment, based on its  
9 response, and that is that Mr. Khan and others -- who,  
10 where, when we don't know -- conspired to provide the  
11 material support to Jaleel, knowing and intending that  
12 Jaleel would conspire to kill overseas.

13 And in their response, when they say that he  
14 conspired to provide material support to Ali Jaleel, I see  
15 this as a material difference than conspiring with him, in  
16 terms of understanding what the government's theory is and  
17 enabling us to prepare our defense.

18 So we have at least these two different ways of  
19 looking at the possible conspiracies in the indictment  
20 and --

21 THE COURT: Can we go back to the -- Well, that's  
22 fine right there.

23 Based on what are you saying that this is the  
24 theory you view as consistent with the government's  
25 response?

1 MS. BAGGIO: I base that on the fact that in their  
2 response, court record 132, at page 3, they say, hey, the  
3 indictment sets forth a factual scenario in which defendant  
4 conspired to provide material support to Ali Jaleel, as  
5 opposed to the indictment, which says that he conspired with  
6 Ali Jaleel to provide support to, and then it doesn't say to  
7 whom.

8 Does that distinction make sense, Your Honor?

9 THE COURT: It does. I understand the  
10 distinction. I just wanted to make sure where you got that  
11 this was the government's theory. And it's page 3 of the  
12 response?

13 MS. BAGGIO: That's correct, Your Honor.

14 May I proceed?

15 THE COURT: Yes.

16 MS. BAGGIO: Thank you.

17 The parties agree that the rule of law as to a  
18 challenge for vagueness is set forth in the *Bohonus* case,  
19 and those four factors. And our position is that any of the  
20 four, analysis of any of the four brings us right to a  
21 conclusion that this indictment is insufficient.

22 Regarding the --

23 THE COURT: Can I pause you there.

24 I think I understand your double inchoate  
25 argument. It's the vagueness argument I want to make sure I

1 understand better.

2 Is the vagueness argument based on the -- if we go  
3 back to the "Some Possible Conspiracies" screen. Is it  
4 based on the question marks in the initial boxes being  
5 unanswered, sort of, that there's not enough to go on there,  
6 or is it grounded in the inconsistency between the two  
7 possible theories itself, or both?

8 MS. BAGGIO: Both. And I think also without an  
9 ability to make sure that Mr. Khan is being prosecuted based  
10 on the same facts found by the grand jury. And when the  
11 indictment isn't clear, then we can't know on what facts  
12 they indicted him.

13 Your Honor, the defense -- the defense's ability  
14 to prepare is hampered significantly if we can't understand  
15 the applicable conspiracy theories, and our ability to  
16 adequately advise the defendant of the possible punishment  
17 is also hampered if the indictment is not clear as to  
18 punishment.

19 As I just mentioned --

20 THE COURT: I want to make sure I understand  
21 again. You have a third argument, right, that even if you  
22 can by the end of today come to an understanding of what  
23 those are, you remain unsure whether any current  
24 understanding of the theory of the charge fits what the  
25 grand jury did or didn't do, right? In other words, that



1 there may be some problem between the theory being advanced  
2 now and the actual presentation and decision by the grand  
3 jury.

4 MS. BAGGIO: That's correct. That's correct.

5 THE COURT: The reason I'm asking that is if I  
6 understand your position correctly, that's not a problem  
7 susceptible for a post hoc solution.

8 MS. BAGGIO: That is correct.

9 THE COURT: All right.

10 MS. BAGGIO: And in that sense, the possible  
11 maximum punishment and ambiguities as to that are relevant  
12 both as to issue one, the overall vagueness of the  
13 indictment, but also with specific regard to issue three.  
14 And that is whatever the -- the requirement under *Apprendi*  
15 and *Burrage* and *Alleyne* -- I may have mispronounced that --  
16 that the indictment has to provide a specific finding that  
17 the defendant's conduct resulted in the death of victims in  
18 order to --

19 THE COURT: Again, that's just the same argument  
20 on punishment, but you're making the same fundamental  
21 argument on criminal liability also?

22 MS. BAGGIO: That is correct, because that  
23 ambiguity affects liability, that's correct.

24 Excuse me. And just the double jeopardy issue is  
25 the same. Again, if we don't know what the conduct is, the

1 conspiracies that they're alleging, we can't defend Mr. Khan  
2 and his double jeopardy rights in the future.

3 And then lastly, I think the difficulty in writing  
4 this motion and litigating this motion highlights the fourth  
5 factor, and that is whether the Court is able to determine  
6 the sufficiency of the charge. And with this ambiguity,  
7 it's our position that in fact you can't determine the  
8 adequacy of the charge.

9 So that's our arguments as to the overall  
10 vagueness.

11 The second issue that we raise is the  
12 impermissible double conspiracy aspect, Your Honor. And  
13 under the *Broce* case, "A single agreement to commit several  
14 crimes constitutes one conspiracy," and "multiple agreements  
15 to commit separate crimes constitute multiple conspiracies."

16 And this makes sense because the crime is the  
17 agreement. And we understand that.

18 I think when I originally wrote the motion, Your  
19 Honor, I was arguing that there could be no double-layered  
20 conspiracies, period, and I'd like to step back from that,  
21 Your Honor, because I think in preparing for the hearing and  
22 in reviewing the case law, I think that is an overstatement.  
23 I believe there can be double-layered conspiracies  
24 consistent with the law, and I think there even could be  
25 double-layered conspiracies that start with a 2339A and

1 cross-reference a second conspiracy for a 956. So I want to  
2 make those positions clear. We're not saying that per se  
3 it's impossible.

4           However, what isn't possible is the way they  
5 charged him in this case. And that is because that when you  
6 have a material support conspiracy charge that's  
7 cross-referencing a separate 956 conspiracy charge, as  
8 Mr. O'Connor addressed in the motion for jury instruction,  
9 the government bears the burden to prove that the defendant  
10 knowingly and intended that support to further the elements  
11 of the 956 conspiracy, which is consistent with the case law  
12 we cited in that motion.

13           In the *Khan* case cited beside the government and  
14 by the defense, it was a different scenario because the  
15 court in that -- in the Fourth Circuit *Khan* said that it was  
16 okay, it was okay to charge the 2339 conspiracy and the 956  
17 conspiracy because they had separate objectives.

18           This goes back to where I started, and that is the  
19 importance of the 956 cross-reference in this case. Without  
20 the elements of the 956, there is no 2339A conspiracy, and  
21 that is because the -- if there was an allegation that  
22 Mr. Khan, knowing and intending to further a bank robbery  
23 provided material support, well, that wouldn't be a material  
24 support case because bank robbery isn't one of the 40 listed  
25 offenses.

1           So, too, we look at the elements of the 956, and  
2       what I see here, Your Honor, what I think is happening, is  
3       that we know with the elements of a 956 prosecution, one or  
4       more of the actors has to be in the United States, and  
5       that's what gives federal jurisdiction; it gives the hook.

6           Now, here what I think has happened is that in  
7       fact the government is not alleging Mr. Khan's direct  
8       involvement in the 956. They don't want to. That's why it  
9       was charged as conspiracy to provide material support in  
10      furtherance of a conspiracy to kill or maim overseas.

11          So either Mr. Khan provides the link to make the  
12      956 charge cross-referenceable, I think I'd say, even though  
13      it's not an appropriate word, but that's what gives the 956  
14      charge legs, because there's no other U.S. person involved,  
15      or in fact it's the same offense. It's the same conduct,  
16      it's the same objective. And if that's the case, then it is  
17      an impermissible conspiracy, because there are actually two  
18      layers, and that, even under the *Khan* case in the Fourth  
19      Circuit, means that this was improperly charged and should  
20      be dismissed.

21          THE COURT: I'm going to pause you there because I  
22      think it will help me to make sure I understand the  
23      argument, and particularly since it's a little different  
24      from the argument I thought you were making in your briefs.

25          So let's start with the latter. The problem

1 addressed in the article you've cited I believe is different  
2 than the problem you've just argued. One is more abstract.  
3 Your argument right now is very concrete both as to facts  
4 and statutory text.

5 So the abstract argument I think I got, which was  
6 essentially that if you're charging someone with agreeing to  
7 agree, you're really just charging very predicate conduct.  
8 By that I mean conduct that's prior to the commission of any  
9 crime. If I say, "I'm agreeing with you all that some day  
10 we'll get together and agree to rob a bank," well,  
11 fundamentally I haven't yet agreed to rob a bank, and  
12 therefore what I've done is prior to any criminal liability.

13 And that's the problem I see raised by the law  
14 review article that you've relied on somewhat, and I think  
15 it is a problem if that's how the crime is charged. And  
16 what the Fourth Circuit *Khan* case suggests is that that is  
17 not a problem if you have two different concrete goals. So  
18 it's one thing to say, "I agree that some day we'll get  
19 together and agree to rob a bank." It's another to say, "I  
20 agree to conspire with people right now to come up with  
21 money to fund somebody else's conspiracy to rob a bank."

22 Now whatever other problems we have, we don't have  
23 the problem that I'm indicting conduct that's prior to any  
24 real criminal misbehavior. That's the argument that, in  
25 part, just in small part, I thought you were making coming

1 in.

2 Now I want to see if I understand the shift a  
3 little bit, and it sort of turns on the Fourth Circuit's  
4 *Khan* decision. So what you're saying I think is here very  
5 specifically, the statute allows for a conspiracy to provide  
6 material support, so long as those who conspired do so know  
7 or intend that the stuff they're providing, the material,  
8 will be used in preparation for or carrying out a number of  
9 statutes. One of them is 956.

10 So the statute seems to suggest that you can  
11 conspire to provide material support, knowing or intending  
12 that it will be used in a conspiracy to maim or kill  
13 overseas. And you're telling me right now that at least in  
14 the abstract, you think that can, by a proper indictment, be  
15 charged?

16 MS. BAGGIO: Agreed.

17 THE COURT: And the sort of irreducible minimum  
18 that you need to successfully pull that off I think are a  
19 couple things, if I have you right. One is that you have  
20 two separate objectives, it can't be the same objective; and  
21 two, that you have all the elements of 956 alleged. The  
22 indictment needs to allege not only the material support  
23 conspiracy but must contain with it all the elements of 956,  
24 including U.S. person, for example?

25 MS. BAGGIO: Because it's relevant to the mens rea

1 burden, correct.

2 THE COURT: So I have -- so the mens rea you think  
3 must be charged and found by the grand jury is double: a  
4 mens rea to conspire with someone to provide material  
5 support, knowing what? What do you think the indictment has  
6 to say about what you have to intend or know?

7 MS. BAGGIO: I believe that's set out in our  
8 proposed jury instruction, Your Honor, the knowing and  
9 intending and then listing each of the elements of 956. Not  
10 to say that the government must prove all 956 elements, but  
11 just that the defendant knew and intended satisfaction of  
12 each of them.

13 THE COURT: Otherwise the defendant didn't know or  
14 intend a violation of 956?

15 MS. BAGGIO: That is correct. And otherwise,  
16 without those key facts in the allegation -- in the charging  
17 instrument, we are at a loss as to how to prepare our  
18 defenses to -- as -- we're not sure what the grand jury  
19 found or what facts made the grand jury think that Mr. Khan  
20 knew and intended a 956 conspiracy when, again, the  
21 indictment is not clear, but it appears to me that there is  
22 absolutely zero United States connection to that 956  
23 cross-referenced conspiracy.

24 THE COURT: Do you have in front of you from your  
25 research Count 5 of the Fourth Circuit *Khan* case?

1 MS. BAGGIO: I don't --

2 THE COURT: The indictment in *Khan*.

3 The reason I ask is I only have what Fourth  
4 Circuit quotes from the indictment, and it quotes basically,  
5 "conspiring to provide material support, intending that it  
6 be used in carrying out a violation of Section 956."

7 And 956 is in brackets, so I don't know what they  
8 actually said.

9 MS. BAGGIO: Your Honor, I'm sorry, I don't have  
10 it in front of me. My recall was that I tried to get it off  
11 of Pacer and it was like a 46-count indictment and the  
12 indictment itself wasn't available. But that's just my  
13 recall, but I don't recall specifically.

14 THE COURT: But the reason you believe that to  
15 charge a double conspiracy, such as the one that 2339A  
16 allows, the reason you have to set out 956 -- Well, first,  
17 your position is that you must -- that the government, that  
18 is, must set up that the person conspiring to provide  
19 material support knows or intends that all of the elements  
20 of 956 are going to happen. And the reason for that is that  
21 otherwise what? What fails to happen if that doesn't  
22 happen?

23 MS. BAGGIO: Well, I think all four of the *Bohonus*  
24 factors are indicated in that, Your Honor: Our ability to  
25 defend the case; to know what the grand jury found; to



1 ensure his double jeopardy rights; and to allow us to raise  
2 challenges and then allow the Court to evaluate challenges  
3 to the sufficiency of the charge.

4 THE COURT: All right. Thank you.

5 MS. BAGGIO: Your Honor, I think -- again, I'm  
6 speculating about why the charging instrument was structured  
7 this way. My -- I believe a reasonable conclusion would be  
8 that the government is in a position where they believe  
9 they've got clear evidence to document Mr. Khan's support of  
10 Ali Jaleel. However, what's much less clear is evidence  
11 related to Mr. Khan's knowledge and intent when he gave that  
12 money to Mr. Jaleel in November of 2008, and moreover,  
13 ultimately what happened to Mr. Jaleel.

14 And I believe that that's the reason why they  
15 charged it this way, not direct material support in  
16 reference to a 956, but conspiracy. So it's one step away  
17 from that.

18 And I think that if that -- if the government's --  
19 if the government's goal is to have Mr. Khan be responsible  
20 for what it believes are Jaleel's actions, the fact of the  
21 matter is they can't prove the requisite intent -- excuse  
22 me. The indictment doesn't allege the requisite intent with  
23 sufficient clarity to allow the defense to properly present  
24 a defense and investigate a defense. And by using these  
25 kind of step-back layers, the conspiracy to commit a

1 conspiracy, it's attempting to lessen its burden, but it's  
2 our position, based on our papers and the argument, that  
3 that is inappropriate and that the indictment should be  
4 dismissed.

5 And then the last thing I have is, Your Honor,  
6 with regard to the statutory maximum. And I think our  
7 argument was pretty clear on that, that it needs to be -- I  
8 referenced at the beginning, I won't be redundant, but that  
9 the finding of the grand jury needs to be in the indictment.

10 Here the indictment doesn't even allege that  
11 Mr. Khan's support was the cause of death, not to mention it  
12 doesn't allege that it was the but-for cause. And, in fact,  
13 there's no specific grand jury finding -- and this is  
14 addressed in comparison of our indictment to that in the  
15 Exhibit B that we provided, in which at the conclusion of  
16 the description of the conspiracy, the last line is, "and  
17 this offense resulted in death." We don't have that.

18 And I would submit that after *Burrage*, that  
19 wouldn't even be sufficient language, that it would have to  
20 be, "and this offense was the but-for cause of death."

21 But regardless, it's our position that it's also  
22 vague as to punishment, and at a minimum, the statutory  
23 maximum the Court should find is 15 years, but also we  
24 believe that it's just overall so vague that we're unable to  
25 adequately defend the case, to ensure the grand jury

1 findings are the same facts on which the government is  
2 prosecuting Mr. Khan, to preserve his double jeopardy  
3 rights, and also finally to allow us to make and the Court  
4 to consider challenges to the sufficiency of the charging  
5 instrument.

6 THE COURT: Excuse me. Could you help me with one  
7 last issue, the preservation of double jeopardy rights. How  
8 does this play out? If this goes to trial, what's the issue  
9 you face there?

10 MS. BAGGIO: Your Honor, if we're not sure which  
11 individuals are in which conspiracy and which conduct of  
12 which individuals are the basis for the charge, then that --  
13 and we don't adequately object to it at this point, if for  
14 some reason Mr. Khan prevails and the government decides to  
15 bring an indictment later that alleges some of these same  
16 players doing some other aspect of conduct, we wouldn't be  
17 able to properly protect and raise and litigate a double  
18 jeopardy claim against the subsequent prosecution. So I  
19 think the certainty in the players and the conduct and what  
20 the government's theory is as to who belongs in which  
21 conspiracy and what they did would allow us to properly  
22 protect his double jeopardy rights.

23 THE COURT: Thank you.

24 Let's take these one at a time.

25 MR. KNIGHT: Thank you, Your Honor.

1 I will attempt to track the three separate areas  
2 of the motion to dismiss and the issues that Ms. Baggio has  
3 raised. And obviously, if there are areas the Court would  
4 like me to specifically address, I will do so.

5 THE COURT: Let's start with the sort of textual  
6 analysis as it relates to what you -- what the text, the  
7 cross-referencing text would obligate you to do,  
8 particularly by way of identifying the elements of 956.

9 MR. KNIGHT: Yes, Your Honor.

10 I think at the outset, paragraph 7 of the  
11 indictment, which lays out the government's theory of the  
12 conspiracy, is sufficient under the statute. And I -- and  
13 that's a key point because, I mean, there's a discussion of  
14 what is complicated about the facts and there's a discussion  
15 about what is legally sufficient. And while the facts may  
16 be complicated as to their relevance to each of the two  
17 statutes, including the predicate statute, we think they're  
18 sufficient.

19 Now, with respect to the Court's question, we  
20 believe the government has an obligation legally to show  
21 that there was a conspiracy that the defendant entered into  
22 under 2339A to provide material support, and he did so  
23 knowing and intending it was to be used for the 956.

24 There is an obligation separately with the 956, we  
25 believe, to show that that conspiracy was in fact entered

1 into, and there was some jurisdiction that gives that  
2 efficacy under the 2339A statute. So Ms. Baggio is correct  
3 to say that under 956, there needs to be an actor in the  
4 United States for there properly to be jurisdiction.

5 THE COURT: An actor in the 956 conspiracy?

6 MR. KNIGHT: That's correct. So the government  
7 has an obligation to show individuals in the conspiracy who  
8 would be in the United States.

9 THE COURT: How? How would we learn that that's  
10 an important part of this case and one the grand jury found  
11 from the indictment?

12 MR. KNIGHT: Well, I mean, I think the facts set  
13 out -- well, first of all, the government isn't obligated to  
14 -- it's obligated to present a legally cognizable charge to  
15 the grand jury and in the indictment so that Mr. Khan has  
16 notice of the charges against him and the manner in which  
17 the government is going to proceed.

18 In this case, because the way the indictment is  
19 phrased and characterized, we believe there are facts  
20 adequate to support findings under 2339A and 956 that there  
21 are persons involved in both conspiracies. And quite simply  
22 I can lay out the government's theory on that.

23 THE COURT: Facts adequate to support found by  
24 whom, when?

25 MR. KNIGHT: By the grand jury, the way in which

1 the overt acts are laid out in the indictment that a finding  
2 was made that is adequate to support the charge. And that  
3 goes to notice and it goes to vagueness, which are the two  
4 concerns in that first part of the motion to dismiss.

5 And I can be more specific.

6 THE COURT: Go ahead.

7 MR. KNIGHT: The government's theory, which it has  
8 never been shy about advancing -- and this also goes to the  
9 double conspiracy argument -- is that the defendant entered  
10 into an agreement with Ali Jaleel, with him to support him,  
11 to provide material support. And the statute defines what  
12 material support is. And that that agreement was  
13 specifically designed to further, and knowing and intending  
14 that they would encourage and support and act to murder and  
15 maim and kill individuals overseas.

16 In support of that, the government lays out  
17 factually its theory of the case, the communications between  
18 Mr. Khan to Mr. Jaleel, the efforts to get money to  
19 Mr. Jaleel from Mr. Khan, and what we believe is evidence of  
20 knowledge on Mr. Khan's part that in fact the support would  
21 result in death overseas.

22 So to that extent, we believe we've provided  
23 adequate notice, which I think speaks to the question of  
24 vagueness under *Bohonus*, the case that sets the standard for  
25 whether or not the indictment itself is impermissibly vague.

1 And I think a lot of the factual arguments that the  
2 defendant is making underscore a knowledge of the potential  
3 theories and the facts of the case.

4           You know, the claim has been made and the argument  
5 has been made that the reason the indictment is inadequate  
6 is that the defendant cannot adequately prepare a defense,  
7 but the only substantive argument that has been made to  
8 support that really is we're not sure who all the  
9 conspirators are. And the government at the last hearing we  
10 had explicitly stated who named conspirators are, and that  
11 was Mr. Khan and Mr. Jaleel; and secondly, the law is clear  
12 that the government is not required to identify every single  
13 conspirator in a conspiracy. So to that degree, we think  
14 the defense can adequately prepare a defense, because that's  
15 one of the standards for determining whether or not the  
16 indictment as laid out is impermissibly vague.

17           THE COURT: So in terms of two possible  
18 conspiracies, one consistent with the indictment and one  
19 consistent with your response, I guess what you're telling  
20 me is that you believe it's -- you've charged in advance --  
21 that is, you've indicted and advanced both -- that Khan and  
22 Jaleel conspired to provide support to Jaleel.

23           MR. KNIGHT: Precisely. I mean, the  
24 characterization of this as an inconsistency we just simply  
25 think is inaccurate. I mean, they're conspiring with each

1 other, because that's the definition of a conspiracy, it's  
2 an agreement, and the agreement has to be to give material  
3 support to someone, because that's the way the statute is  
4 written. And this is not new news. This has always been  
5 the theory that --

6 THE COURT: And your indictment, you contend,  
7 makes clear, at a minimum, that the conspirators for the  
8 2339A are Khan and Jaleel and others, and that the material  
9 support is provided to Jaleel?

10 MR. KNIGHT: Precisely. And there are paragraphs  
11 setting forth specific transactions and actions we believe  
12 were undertaken by this defendant to provide support to  
13 Mr. Jaleel. They're agreeing with each other to provide  
14 that support. And that is not an uncommon, and perhaps the  
15 most common interpretation of this statute and the manner in  
16 which it's used in reported cases.

17 THE COURT: You've told me, I think, that the  
18 combination of the written words of the indictment and the  
19 presentation to the grand jury cover notice and vagueness.

20 MR. KNIGHT: Well, I mean, there are a couple of  
21 issues here. I think there is the motion to dismiss on the  
22 basis that it is vague, and then -- I'm understanding a  
23 separate argument to be that they cannot be certain that the  
24 grand jury properly considered the evidence in the  
25 indictment. I see those as two issues now.



1 THE COURT: All right. So let's start with the  
2 latter one. So one of the arguments you're facing is that  
3 the grand jury, under a sort of *Apprendi* argument, not so  
4 much for sentencing, but overall, needed to have presented  
5 to it the question whether the elements of 956 were in the  
6 defendant's mens rea somehow.

7 Do you agree that that is required; and if so, do  
8 you agree you did it somehow?

9 MR. KNIGHT: I do not believe it's required,  
10 because what is required is that we present to the grand  
11 jury facts supporting of the alleged criminal conduct for  
12 which they found a violation under the probable cause  
13 standard. The statute he is alleged to have violated is  
14 2339A. However, there is a predicate statute for which we  
15 are obligated to explain and -- explain its role in relation  
16 to the 2339A. So I think the answer to the second --

17 THE COURT: I don't think people disagree that  
18 that's the legal framework, it's just that when you say you  
19 are under an obligation to explain how 956 cross-references,  
20 how much of an obligation? What is it about 956 you are  
21 obligated to put in the indictment and present to the grand  
22 jury, in your view?

23 MR. KNIGHT: That there are facts sufficient to  
24 show that a 956 conspiracy -- well, indeed occurred or that  
25 that was the purpose of the agreement between Mr. Khan and

1     Jaleel and others.

2             THE COURT: So do those facts -- does that require  
3     you to show that there are facts sufficient to show that the  
4     elements of 956 were met?

5             MR. KNIGHT: With a predicate offense, I do not  
6     believe the law requires a showing that all of the elements  
7     of the predicate offense be committed in order to commit the  
8     underlying offense. However, it's the government's position  
9     today, given the facts in this case, that we did, and it is  
10    our theory that there are facts sufficient to show that this  
11    individual had the mens rea for that underlying conspiracy,  
12    and that that's presented in the overt acts in the  
13    indictment as well.

14            THE COURT: I don't mean to quibble, I just want  
15    to make sure I get it that you believe that in this case you  
16    have facts and, in fact, presented to the grand jury facts  
17    sufficient to show that this defendant knew all he needed to  
18    know to touch on all of the elements of 956.

19            MR. KNIGHT: That's right. Because Ms. Baggio  
20    makes a point that is an accurate one, which is there does  
21    need to be some jurisdiction for that 956, which means a  
22    person in the United States. And there are a limited number  
23    of people in the United States for which liability could be  
24    attached, we think, for the 2339A. So the answer is yes, we  
25    believe we have.

1           THE COURT: Let me just back up for a second. So  
2 your initial legal position is that in a cross-referencing  
3 situation like this, you're not obligated to show that  
4 someone in a 2339A conspiracy knows of all of the elements  
5 of the cross-referenced crime; that it may happen here, but  
6 that's not your legal obligation?

7           MR. KNIGHT: That's right. Because what they have  
8 to know is that it's intended to commit the predicate  
9 offense.

10          THE COURT: All right. So is jurisdiction a  
11 special case? I mean, do you always have to prove that?

12          MR. KNIGHT: No, but in order for I think the  
13 offense to be cognizable in some way, you need to show that  
14 jurisdiction exists. I mean, I think --

15          THE COURT: You need to show it in the indictment?

16          MR. KNIGHT: No, I don't believe so. And again, I  
17 mean, our theory --

18          THE COURT: A U.S. person in 956 is a  
19 jurisdictional prerequisite for that cross-referenced  
20 statute to be a valid cross-referenced statute in a 2339A  
21 conspiracy?

22          MR. KNIGHT: That's right. I mean, I don't think  
23 the government could go forward if it knew it did not have  
24 jurisdiction for a predicate offense. I don't think it  
25 could present something to the grand jury. And I'm speaking

1 a little out of turn that it knew it did not have  
2 jurisdiction and therefore the offense itself, you know, was  
3 not cognizable --

4 THE COURT: I guess that's the main point I'm  
5 getting at. I think I hear you saying that it is sort of  
6 a -- it's a necessary piece of the presentation somehow of  
7 the case that the cross-referenced crime have at least a  
8 jurisdictional element met. And so I'm just asking, if  
9 that's part of the case, is it necessary for you to put it  
10 in the indictment and present it to the grand jury?

11 MR. KNIGHT: I don't believe the law requires  
12 that. I think the law requires -- and I'm not saying it  
13 didn't happen. I think the law requires that the government  
14 accurately represent and present the manner in which the  
15 statute makes the conduct criminal. I think part of that  
16 would be the jurisdiction, arguably, because it would not be  
17 an offense unless jurisdiction existed, so --

18 THE COURT: So do you agree that the  
19 jurisdictional element of 956 isn't in the text of the  
20 indictment?

21 MR. KNIGHT: That's right. And I don't think  
22 it's in the -- because it's not in the text of the statute  
23 that Mr. Khan is alleged to have violated.

24 THE COURT: But it is in your grand jury  
25 presentation?

1           MR. KNIGHT: We believe it's in the facts of the  
2       overt acts that the defendant knows, and therefore it was in  
3       the grand jury presentation.

4           THE COURT: Go ahead.

5           MR. KNIGHT: So that sort of speaks, I think, the  
6       indictment a little bit, Your Honor. And with regard to the  
7       inconsistency, I think I've touched on that argument, or the  
8       alleged inconsistency.

9           I want to again, then, get to what I think is the  
10      remaining argument on vagueness, which is preparing -- being  
11      able to prepare a defense, which has been the claim. And I  
12      think we've addressed that, to the extent that there is  
13      nothing specific we are hearing that suggests a defense  
14      can't be prepared. In fact, every argument seems robust and  
15      would belie that claim.

16           And then double jeopardy was the last argument  
17      made in support of that position. I'll get to the  
18      punishment issue later because I see that as a separate  
19      argument.

20           THE COURT: Well, let me see if I can walk through  
21      this in my own mind for a second. I apologize that I do  
22      this a lot. It helps me make sure I understand the parties'  
23      positions.

24           So I think you're saying in response to what  
25      Ms. Baggio has argued that as to the textual requirements, I

1 think I understand your argument for why you've met them;  
2 that you don't have to lay out in the indictment all of the  
3 text -- the elements of 956. There's a sort of a core  
4 requirement to meet the criminality charged in 956, and you  
5 think you've done that both in your overt acts and in your  
6 grand jury presentation, particularly as to jurisdiction.

7 As to the idea that Ms. Baggio has advanced that  
8 she's not sure which of more than one theory the government  
9 is advancing or the grand jury heard, I think your answer --  
10 help me here if I'm wrong -- is that the inconsistencies,  
11 the multiple possible conspiracies she's pointed out really  
12 aren't that; there's just one conspiracy, and it can't  
13 really fairly be broken out into multiple inconsistent  
14 conspiracies. Have I got that right?

15 MR. KNIGHT: That's right. And let me follow up  
16 on that. I mean, I think on the jurisdiction issue, one  
17 more point I want to make, and I think I perhaps complicated  
18 it too much.

19 I think the first line in the indictment is that  
20 we are alleging that Mr. Khan is a naturalized citizen  
21 residing in the jurisdiction of this district. And so from  
22 that, you know, we believe that, again, the grand jury  
23 presentation adequately meets any jurisdictional question.

24 THE COURT: All right.

25 MR. KNIGHT: Now, the Court's question on multiple

1 theories, pleading and proof are two different things  
2 generally in any criminal indictment. The government isn't  
3 obligated to plead -- it can plead multiple theories for  
4 which there may be various avenues of proof.

5 I'm understanding the argument to be that they --

6 THE COURT: Let me stop you there for a minute.  
7 Is that what you're doing right now at this point in time?

8 MR. KNIGHT: No.

9 THE COURT: Are you pleading multiple theories and  
10 having to elect which one you're going to advance?

11 MR. KNIGHT: No. Actually, I think in this case,  
12 given the complexity of this case, the government has been  
13 quite transparent and quite straightforward about the manner  
14 in which it's proceeding in this case and what the facts  
15 are. So that's why it's confusing to the government when  
16 the statement is made that the defense can't adequately  
17 prepare a defense because the indictment is impermissibly  
18 vague. Substantively, there do not seem to be arguments  
19 that support that, other than a conclusory statement that  
20 it's vague; we don't know what the government is doing. The  
21 only thing we're hearing is that it's not clear which  
22 conspiracy or which conspirators are involved.

23 THE COURT: Well, do you have a paper copy of the  
24 PowerPoint presentation in front of you like I do?

25 MR. KNIGHT: I do.

1 THE COURT: Early on, there's this "Some Possible  
2 Conspiracies" slide with blue and red bubbles.

3 MR. KNIGHT: Yes.

4 THE COURT: So that's not her only argument, but  
5 at the core is the sort of inconsistency argument that there  
6 are two very different possible conspiracies here. They're  
7 very different from each other. They trigger different  
8 mens reas, and the defense doesn't know which one you're  
9 advancing.

10 What's your response to that?

11 MR. KNIGHT: Well, I'll -- I will state which one  
12 we're advancing, but I think it's clear from the indictment,  
13 and that is that the defendant entered into an agreement  
14 with Mr. Jaleel to provide him material support for the  
15 purpose, and knowing and intending that that support would  
16 be used to carry out the crime of 18 U.S.C. 956.

17 Now, there may be others involved in the  
18 conspiracy, particularly the 956 conspiracy, but the  
19 evidence and manner in which we plan to present it at  
20 trial --

21 THE COURT: You've been very clear about the  
22 mens rea in the left-hand side of the boxes, very clear  
23 about what you contend the mens rea is. And now I'm going  
24 to ask you to be clear about which of the two different  
25 mens reas in the middle boxes you're advancing. Whether



1 that solves the problem or not remains to be seen, but those  
2 are two different mental states requiring different  
3 defenses.

4 MR. KNIGHT: Well, you know, I think, looking at  
5 this, that to say knowing and intending Jaleel -- well, I  
6 mean, I don't -- it is not clear they're as different. I  
7 mean, one contains Jaleel's name and one does not, but there  
8 were multiple people involved in the conspiracy, so --

9 THE COURT: I guess there's three answers. It's  
10 either the first box, the second box, or both.

11 MR. KNIGHT: Well, in just looking at this,  
12 without parsing out the words, to me it seems both, because  
13 the red box seems to exclude any other people who may be  
14 involved in the 956 conspiracy, and that's never been the  
15 suggestion.

16 THE COURT: That's your answer -- right? -- is  
17 that what you're contending and what you presented to the  
18 grand jury is that Khan and Jaleel conspired to provide  
19 material support to Jaleel and possibly others, knowing and  
20 intending Jaleel and possibly others would conspire to kill  
21 overseas.

22 MR. KNIGHT: And to be totally transparent, the  
23 "possibly others" is a more salient part of the latter of  
24 the two sets of boxes than the first, because the agreement  
25 is between those two, and there are obviously multiple

1 people involved in the bombing. And so the conspiracy to  
2 commit the 956, of which we are alleging these individuals  
3 were part of, involved multiple people.

4 THE COURT: And then lastly, your answer as to the  
5 who, where, when question is that that's a funnel that a  
6 trial travels down and we're getting closer to that all the  
7 time, but you're not required to be there yet in this stage  
8 of challenging the indictment?

9 MR. KNIGHT: That's right.

10 THE COURT: All right.

11 Do you wish to respond?

12 MS. BAGGIO: Thank you, Your Honor.

13 Your Honor, I'm still not sure who is in the 956  
14 conspiracy. If we can start with the chart there.

15 Going back to the mobile -- or the box, what I  
16 understood Mr. Knight to say is we would be in the red box,  
17 knowing and intending Jaleel and others would conspire to  
18 kill overseas.

19 If that's their position, then there is no 956  
20 connection to the United States because Mr. Khan isn't in  
21 the middle box. And that's why it's important for us to  
22 understand. That's why it's important for us to know in  
23 moving forward and defending the case, filing motions and  
24 that sort of thing.

25 THE COURT: Is that a separate -- just a motion to

1 dismiss the indictment? Right now you're alleging that you  
2 don't know. What if you knew? Then wouldn't you just be  
3 filing a separate motion to dismiss, saying that's a vaguely  
4 brought indictment?

5 MS. BAGGIO: Precisely. It's a material element  
6 to have the properly referenced cross -- properly  
7 cross-referenced statute adequately pled. If that is  
8 adequately pled -- and we understand the 956 theory by the  
9 government is that it doesn't involve Mr. Khan directly at  
10 all, it's Mr. Jaleel and others who allegedly committed this  
11 bombing, then our position would be, well, then there is no  
12 jurisdictional connection, just like the government admitted  
13 they need at the beginning of its argument.

14 THE COURT: Do you wish to jump up here?

15 MR. KNIGHT: I do. I'm sorry, Your Honor.

16 I think I can save everyone a lot of work to  
17 clarify. We are saying that Mr. Khan would be part of the  
18 956 conspiracy. 956 is a conspiracy. It is not an  
19 allegation of an attack. So when Ms. Baggio says that the  
20 government is saying that Jaleel and others were responsible  
21 for the bombing, that's a factually different issue.

22 We're saying that Mr. Khan, in an agreement with  
23 Jaleel, was conspiring to murder, maim or otherwise kill  
24 overseas. So we've never been -- that's what I'm saying.  
25 We know there is a jurisdictional necessity that somebody in

1 the United States for a 956 to occur be part of that  
2 agreement, and it's been our theory that Mr. Khan is in an  
3 agreement to effectuate the goals of that separate  
4 conspiracy. And I can address that in the double conspiracy  
5 piece, but to save the issue of --

6 THE COURT: So I'm sort of punting the issue of  
7 whether any vagueness questions can be solved by the  
8 government's positions in court, but it may solve some but  
9 perhaps not all, but it's still worth doing. So it appears  
10 the government's answer is, you know, just to use your chart  
11 here, that it's the red box with a couple of additions,  
12 knowing and intending that Jaleel, Khan, and others would  
13 conspire to kill overseas.

14 MS. BAGGIO: Two points on that. First of all,  
15 yes, the indictment doesn't say that; but number two, then I  
16 think we're in the Fourth Circuit *Khan* problem that I  
17 argued. It's all the same thing. There is then no  
18 separate, distinct objective. It's all the same thing.

19 THE COURT: Tell me what you're relying on from  
20 *Khan*. What language are you relying on from *Khan*?

21 MS. BAGGIO: Yes, Your Honor.

22 THE COURT: I want to get more clarity on that  
23 thought.

24 MS. BAGGIO: I believe both parties cited to the  
25 same language in *Khan*, Your Honor.

1 THE COURT: What page?

2 MS. BAGGIO: On page 8 of the defense memorandum.

3 THE COURT: Do you happen to know the *Khan* page?

4 MS. BAGGIO: I beg your pardon?

5 THE COURT: Do you know the page to the *Khan*  
6 opinion?

7 MS. BAGGIO: Oh, I'm sorry. I believe --

8 THE COURT: It's got to be 492 or 493, right?

9 Tell me if this is the language you're relying on.  
10 I'm quoting from *Khan* at the very beginning of page 493:

11 "Courts have recognized that one  
12 conspiracy can serve as the predicate for  
13 another conspiracy when the overarching  
14 conspiracy and the predicate conspiracy are  
15 distinct offenses with entirely different  
16 objectives."

17 MS. BAGGIO: That is correct. I apologize. I see  
18 I omitted the pin cite from my brief. That's correct.

19 THE COURT: So your idea is that if Khan and  
20 Jaleel conspired to provide support, knowing and intending  
21 that Khan and Jaleel and others would conspire to kill  
22 overseas, that that fails to satisfy the requirement that  
23 the overarching conspiracy have a distinct objective from  
24 the predicate conspiracy?

25 MS. BAGGIO: That's correct, precisely.

1 THE COURT: Thank you.

2 Go ahead.

3 MR. KNIGHT: Speaking now to that second issue as  
4 it relates to the *Khan* case, we believe the defense has  
5 conflated the fact that there are -- that the same person is  
6 in each conspiracy with somehow undermining the  
7 two-objective requirement. If we dial this back a few steps  
8 and look at the law review article that Ms. Baggio initially  
9 cites and the rationale in *Khan*, and the *Stewart* case, which  
10 is a Second Circuit case -- because there's a string of  
11 these cases that talk about this, this concept -- it is  
12 impermissible, obviously, to conspire to commit a conspiracy  
13 of the same offense. I mean, that's the double conspiracy  
14 as we understand it that is written about.

15 So what *Khan* is talking about very clearly -- and  
16 the decision itself doesn't offer a lot of analysis. It  
17 appears, because it's building on these other cases, is that  
18 you need -- you can conspire to commit a conspiracy, and  
19 each conspiracy has a separate objective.

20 Now, in this case, each conspiracy has, by  
21 definition, by operation of law, a separate objective. The  
22 objective of a conspiracy to violate 2339A is to provide  
23 material support, as the phrase "material support" is  
24 defined. The objective of 18 U.S.C. 956 is to kill, murder,  
25 maim or damage property overseas. So the objectives of

1 those two conspiracies are different.

2 The argument that counsel appears to be making  
3 about why in fact they are one and the same is because some  
4 of the facts are the same that support each conspiracy and  
5 Mr. Khan is present in each conspiracy.

6 THE COURT: I think the real argument is that the  
7 goal of the material support of the conspiracy is to maim or  
8 kill overseas.

9 MR. KNIGHT: Well, the goal of material support is  
10 to provide material support, and then it may ultimately be  
11 to kill, murder or maim overseas, but the statute  
12 contemplates those two separate things.

13 THE COURT: Well, you know, you can split words a  
14 lot of different ways. I mean, I understand your argument  
15 that as a legal matter the statute material support creates  
16 an objective to collect material support, but, you know, if  
17 you asked what is the -- what is in the minds of the -- what  
18 is the objective, the purpose of the conspirators who are  
19 providing material support, in this case it's the same  
20 objective as the second conspiracy. They all have the same  
21 overarching goal.

22 My problem with the argument Ms. Baggio is  
23 making -- actually, I'll turn to Ms. Baggio here -- is that  
24 that would really eliminate 2339A in most cases. I mean,  
25 most cases like this, you'll have a material support

1 conspiracy that will share the objective of the -- *Khan*  
2 calls it an overarching conspiracy and a predicate  
3 conspiracy, which the overarching would be the 2339A  
4 conspiracy, and the predicate would be the 956 conspiracy.  
5 In almost every case that I'm aware of that I can  
6 contemplate, you'd have this problem. It would be a problem  
7 that would erase the statute.

8 That may be what needs to happen, but I just want  
9 to make sure that I understand. In other words, in almost  
10 every case, the people who are conspiring to provide  
11 material support, knowing or intending that it be used to do  
12 something, are going to share the objectives of the people  
13 who are going to use it to do something. Therefore, in  
14 almost every case you'd have an illegitimate double  
15 conspiracy, and that seems to run counter to at least the  
16 holdings of *Khan* and others.

17 MS. BAGGIO: Yes.

18 THE COURT: So, for example, in *Khan* itself, the  
19 Fourth Circuit *Khan*, it's very similar to our case in terms  
20 of who is wanting what to happen. You have a Count 5 in  
21 which the defendants were convicted of providing --  
22 conspiring to provide material support to, you know, assist  
23 a conspiracy to kill, kidnap or maim. I'd be shocked if the  
24 facts in that case weren't that the people who were  
25 conspiring to provide material support had the objective in



1 common with the people who were conspiring to kill or maim.

2 So your argument about what *Khan's* holding -- what  
3 *Khan* should do -- *Khan* now talking about Fourth Circuit --  
4 would make the decision in *Khan* wrong. If the principle is  
5 that the people who are in the 2339A conspiracy, if they  
6 have in common the goal of the 956 conspiracy, then that's  
7 illegitimate, that's pretty clearly what happened in the  
8 Fourth Circuit opinion in *Khan*.

9 MS. BAGGIO: I think preliminarily, Your Honor,  
10 there aren't that many cases on this, but we have is a  
11 statute, a material support statute that can be charged  
12 directly, and in that sense, you would have material support  
13 for a conspiracy to commit a 956, and under those  
14 circumstances, this issue would not happen because there  
15 would be no double layer of conspiracy.

16 In this case, the government chose to -- As  
17 Mr. Knight referenced, the discussion in *Khan* about this  
18 issue is very minimal, in fact, but --

19 THE COURT: They certainly didn't spend an hour  
20 and a half on it.

21 MS. BAGGIO: Well, I would just add one other  
22 point on that, and that is that when the government does  
23 usually charge -- when the government does charge a  
24 conspiracy to commit a material support, and then one of the  
25 cross-referenced statutes, in the cases that I've looked at,

1 handful though there are, the cross-referenced statute is  
2 also charged as a separate count. And in that sense it  
3 makes it much more clear that both of the crimes are  
4 separately charged, and the grand jury makes  
5 separate charging -- made separate findings as to both. I  
6 think that's the distinction that makes a big difference in  
7 this case.

8 THE COURT: All right. Thank you.

9 Let's turn to the -- I think the next one you  
10 wanted to run through is -- Mr. Ransom, you wanted to go on  
11 bill of particulars?

12 MR. RANSOM: Yes. Thank you, Your Honor.

13 For the most part that issue has been argued by  
14 Ms. Baggio because the purpose and the reason for our desire  
15 to have the names of the co-conspirators is to determine  
16 exactly what is charged in this indictment and what we have  
17 to meet in regard to each of the -- what we believe are two  
18 alleged conspiracies in this case.

19 This is not a case in which anybody is in danger  
20 or there's some reason the co-conspirators must be hidden  
21 from us. There's no real reason not to disclose the names  
22 at this time.

23 If we wait, Your Honor, if we wait until we get to  
24 trial or right before trial, we're going to run into  
25 Rule 801 problems. Secondly, we're going to run into issues

1 about did we have an adequate opportunity to defend this  
2 case by interviewing the individuals who are the alleged  
3 co-conspirators.

4 As has been noted, there's no one in the United  
5 States who is an alleged co-conspirator in this case, a  
6 knowing co-conspirator in this case. That means they're all  
7 in Pakistan or they're all in the Maldives or in Saudi  
8 Arabia or somewhere else, and if those are not disclosed to  
9 us until right before trial, then we have to ask the Court  
10 for a continuance or a setover so that we have an adequate  
11 opportunity to defend the case, as should be provided to us.

12 It should further be noted that we still do not  
13 have all the emails. The government has notified us that  
14 there are further emails that are material and relative to  
15 this case, and we don't have them. And those emails may  
16 contain statements of other co-conspirators or people who  
17 have not been identified, about who we know nothing.

18 The indictment in this case came down  
19 December 27th of 2012. One would think by this time the  
20 government would have had an opportunity to provide us all  
21 the material that we should have as a matter of course in  
22 any discovery proceeding.

23 So the discovery of the names of the  
24 co-conspirators in this case, particularly even if they're  
25 not going to be witnesses at court, but their statements may

1 be used, are necessary for us to defend Mr. Khan.

2 Thank you.

3 THE COURT: Thank you.

4 So there are a number of elements in the bill of  
5 particulars. Quite a few of them are simply further  
6 discovery requests that I don't view as the sort of thing I  
7 would try to resolve in a bill of particulars, but  
8 Mr. Ransom has raised two other issues raised by the bill of  
9 particulars. One I guess would come from No. 1 and No. 2,  
10 which is really what we've just been talking about with  
11 Ms. Baggio. So in that sense, he's correct, he didn't need  
12 and didn't add anything to the argument we already had  
13 there, and I don't need to hear more on that.

14 And then the third of the three is this idea that  
15 the better preparation of this case is to as early as  
16 possible disclose an issue that on the particulars of this  
17 case will eat up a lot of defense preparation time, given  
18 travel and the like.

19 I know we've set out a schedule. Remind me, first  
20 of all, of the schedule. When under the current schedule  
21 would the government disclose the names of other  
22 co-conspirators in general and 801 statements in particular?

23 MR. KNIGHT: Your Honor, I believe it would be  
24 currently February 9th of 2015, which is the -- when the  
25 trial memoranda are due. And I'm -- in part that's from the

1 Court's order on discovery as relates to co-conspirator  
2 statements.

3 THE COURT: What are the obstacles to disclosing  
4 the names of co-conspirators?

5 MR. KNIGHT: Your Honor, we had this discussion in  
6 the context of discovery before. There really aren't. And  
7 we've been transparent. This is not a case where there is a  
8 list of folks we are waiting to release to the defense. I  
9 frankly can't contemplate that there are any more  
10 conspirators or names that are going to be released to the  
11 defense that are contained in the discovery that we're  
12 withholding.

13 This is a conspiracy that the two principal  
14 participants, their communications have been largely  
15 provided to the defense. There's not a list of names or  
16 other folks that have yet to be provided. So we're sort of  
17 at a loss on this. I mean, I've told this to counsel  
18 repeatedly. There are not more conspirators that we are  
19 planning on presenting at trial that we have not shared with  
20 the defense.

21 THE COURT: So you contend you've shared in some  
22 form all of the information about all of the people that you  
23 know to be involved. What you haven't done yet, which  
24 you'll do in February, is identify which co-conspirator  
25 statements you intend to introduce at trial?

1 MR. KNIGHT: That's right. The use of the  
2 statements and the manner in which we intend to introduce  
3 them we think is a separate question than the notice or the  
4 broader issue of who is involved.

5 THE COURT: All right. Thank you.

6 MR. KNIGHT: Thank you.

7 THE COURT: Mr. Ransom, do you wish to be heard  
8 further?

9 MR. RANSOM: Other than to say, as I think Judge  
10 Burns used to say, that is the meat of the coconut. Without  
11 the identification of who the 801 statements are, it's a  
12 little hard to do.

13 THE COURT: All right. Thank you.

14 MR. KNIGHT: Your Honor, I'm sorry. There was one  
15 more issue on the motion to dismiss I don't know if the  
16 Court would like government response to. That was  
17 Ms. Baggio's third point related to notice of the  
18 appropriate punishment under the statute.

19 THE COURT: I think you've covered that in your  
20 briefing. Was there something not covered in your briefing  
21 you wanted to say?

22 MR. KNIGHT: No, Your Honor.

23 THE COURT: All right. Surplusage. Are we back  
24 to you, Ms. Baggio?

25 MR. RANSOM: No, that's actually mine, Your Honor.

1 THE COURT: All right.

2 MR. RANSOM: And I will not spend a great deal of  
3 time on this. We've argued about the caption, but the Court  
4 I think has indicated it is not going to provide the  
5 indictment to the jury, and if it does not provide the  
6 indictment to the jury, then the caption is meaningless.  
7 But the caption --

8 THE COURT: I don't typically do that and I don't  
9 see a reason to do that here, so -- and I should make clear  
10 that clearly the charges are explained to the jury in some  
11 way very clearly, but the indictment itself I find usually  
12 not particularly helpful to the jury if we agree on  
13 explaining the charges. So there will be a 2339A  
14 instruction, of course there will, and a 956 explanation of  
15 some kind.

16 MR. RANSOM: That's fine, Your Honor, but again  
17 it's the caption which used the word "terrorist" when the  
18 term "terrorist" is not used in the substance of the statute  
19 itself anywhere, as there is no crime of terrorism. The  
20 government keeps talking about it's going to talk about the  
21 crime of terrorism. There is no crime of terrorism.

22 THE COURT: Well, I'm sure we'll take up later  
23 through a motion in limine from you about trial discussion  
24 of -- and use of the word "terrorist," but to the degree  
25 your motion today is directed to the caption of the statute,

1 you're right, it's mooted by my decision not to present the  
2 indictment to the jury.

3 MR. RANSOM: And then we had talked about the term  
4 "as such," which is in the indictment. This goes again to  
5 what Ms. Baggio was talking about, the adequacy of the  
6 indictment itself. They could have said "as such" or "such  
7 as" --

8 THE COURT: "Such as"?

9 MR. RANSOM: -- excuse me, the Twin Towers. They  
10 could put anything. But the fact is, there is no concrete  
11 statement regarding the murder, which is the substance of  
12 the 956 conspiracy which is alleged in the indictment. We  
13 do not believe "such as" is adequate to cover what the  
14 statute itself requires.

15 THE COURT: Thank you.

16 I agree that's an important issue, but only in the  
17 context of the motion to dismiss the indictment or challenge  
18 the indictment as to penalty. I don't think it's  
19 surplusage. I think it just may be inadequate. The  
20 argument that I'm dealing with is that it's inadequate to  
21 trigger the enhanced penalty. Now, of course, if I agree  
22 it's inadequate to trigger the enhanced penalty, then I'll  
23 strike it.

24 MR. RANSOM: Thank you.

25 THE COURT: Mr. O'Connor?



1 MR. O'CONNOR: Thank you, Your Honor.

2 THE COURT: Actually, let me -- well, I hate to  
3 cut you off at the knees here, but I think the debate isn't  
4 what should the jury instruction be but whether we should  
5 try to resolve this right now. The government has said that  
6 jury instructions were too early. And I disagree. I don't  
7 disagree that for a complete set of jury instructions we're  
8 too early. I do disagree that we ought to wait longer to  
9 resolve this sort of debate. We spent a lot of time on it  
10 today, and I'd like to sort out in some way the mens rea  
11 requirements for the jury instruction.

12 So let me ask you this. Tell me what you think  
13 that jury instruction would look like. Are we speaking of  
14 the -- how you'd frame the 2339A instruction?

15 MR. O'CONNOR: That's correct, Your Honor.

16 We set out a proposed instruction on page 6 of our  
17 motion, and that's what we believe the instruction should  
18 look like.

19 And what we're attempting to communicate to the  
20 jury there is that the government has to prove beyond a  
21 reasonable doubt that Mr. Khan had the specific intent when  
22 he entered into the conspiracy to provide material support  
23 to commit the 956, and that specific intent flows to the  
24 elements of the 956.

25 And the other courts that have considered this

1 issue are unanimous that -- that the specific intent does  
2 flow to the cross-referenced 956, and I believe the  
3 government has acknowledged that already this morning. And  
4 so we proposed the instruction on page 6 to communicate to  
5 the jury that they must find that beyond a reasonable doubt.

6 Like I said, Your Honor, we're basing that both on  
7 the text of the statute and on *Mehanna* and *Stewart*, what the  
8 Ninth Circuit mentioned in the *Humanitarian Law Project*  
9 decision that was overruled on other grounds.

10 And as those cases say, and as the text of the  
11 statute makes clear, the cross-referenced 956 is required.  
12 The knowledge and intent to provide the material support, to  
13 advance and to further the preparation or carrying out of  
14 the 956 is an element of the culpable mental state. The  
15 mens rea must go to every element of the 956 in order to  
16 constitute the conspiracy to commit 2339A.

17 THE COURT: Thank you.

18 Do you have any objection to the proposed  
19 instruction on page 6?

20 MR. GORDER: Yes, we do, Your Honor.

21 I guess, Your Honor, since I'm standing up I've  
22 already lost the argument that this is premature, so I'm not  
23 going to spend a lot of time on that.

24 But I think that to try to craft this jury  
25 instruction without reference to some of the other jury

1 instructions is going to be difficult. I mean, we just  
2 spent an hour talking about the theory of 2339A and 956.  
3 When we submit our jury instructions -- and if the Court  
4 requests, we'll do it earlier than February -- you know, I  
5 want to try to craft jury instructions that are as simple as  
6 possible for lay people to understand. And sometimes just  
7 re -- you know, basically rehashing the statute is not  
8 sufficient.

9 I mean, another thing I would do is weave in the  
10 definitions of conspiracy that the Ninth Circuit has  
11 approved in the standard instructions with the -- you know,  
12 the explanation of 2339A and 956.

13 So I can tell you this, Your Honor. I've been on  
14 this case about six months, and I'm still learning what the  
15 facts are. And I know the Court is probably smarter than I  
16 am, but you haven't had the opportunity yet to really  
17 understand the evidence that we're going to be presenting.  
18 The jury instructions need to be crafted in a way that deals  
19 with the facts that are going to be presented in court.

20 THE COURT: Well, let me -- let me assuage your  
21 concerns a little bit. When I say that I agree, I didn't  
22 mean that we'd right now here today then come up with a  
23 final jury instruction. What I agree is important is to  
24 come to a resolution of this issue, the mens rea issue, and  
25 a jury instruction is a good tool for doing that.

1           So the language can be amended later. It may even  
2 have to be amended in light of the evidence presentation at  
3 trial. That happens all the time. And there, of course,  
4 may be other instructions like a conspiracy instruction that  
5 would be either folded in or would predate this instruction  
6 so the jury would already have that knowledge.

7           I intend to use this just as a tool to make sure  
8 that the issue that is of the most pressing concern to the  
9 defense here, and one which I agree needs to be a concern,  
10 is resolved, and that's, you know, what are the real  
11 mens rea requirements.

12           So just taken as an abstract proposition, not as a  
13 final jury instruction, do you have philosophical  
14 disagreements with the way the mens rea is described in the  
15 proposed jury instruction?

16           MR. GORDER: A little bit, Your Honor. And I  
17 think -- if I can find the instruction.

18           You know, for example, in the second-to-the-last  
19 clause, where we start talking about the special maritime  
20 and territorial jurisdiction of the United States, I don't  
21 think that needs to be in there.

22           THE COURT: Well, here's what I'm most concerned  
23 about. The proposed instruction essentially says that this  
24 defendant had to -- there had to be an agreement between  
25 this defendant and Ali Jaleel. We'll punt for today whether

1 you get to add the word "and others" there. By the time we  
2 get to the jury instruction, probably not.

3 "To provide material support" -- I'm looking just  
4 at the mens rea language -- "knowing or intending that the  
5 support would be used in preparation for or to carry out an  
6 agreement by a person within the U.S. and other persons to  
7 commit murder." We'll just simplify it that much.

8 So that's the double knowledge: He has to know  
9 that he's conspired; he has to know that the material  
10 support would be used in a conspiracy to murder.

11 Isn't that pretty much what you've advanced?

12 MR. GORDER: It's similar, Your Honor, but I just  
13 think it's a little -- it could be phrased in a more simpler  
14 fashion. In other words --

15 THE COURT: Sure. I'm not going to get at how we  
16 will say this to the jury. I'm trying to nail down as best  
17 we can whether you and the defense now are on the same page  
18 as to what the mental state requirements are that you're  
19 advancing and that they have to defend, both for defense  
20 purposes and ultimately for double jeopardy purposes.

21 MR. GORDER: I don't think we're that far apart,  
22 Your Honor, but I do think that there is a much better way  
23 to craft this instruction, and would like obviously some  
24 time to do that.

25 THE COURT: How soon can you submit your own

1 proposed jury instruction on the subject covered by the  
2 proposal on page 6 of the defense memo; basically the 2339A  
3 instruction?

4 MR. GORDER: Your Honor, I think, if -- let me  
5 look at a calendar here, part of which is messed up by my  
6 other case responsibilities.

7 By November 25th, which is the day before  
8 Thanksgiving. So basically I'm going to be gone the week of  
9 the 16th, and I have a number of other matters to handle  
10 next week.

11 THE COURT: All right. Go ahead and do that by  
12 the 25th.

13 Don't fold in a definition of conspiracy. That  
14 may happen at trial, it's just not going to help us with  
15 this issue.

16 And then my own -- my own view is that whatever  
17 the jury instruction looks like, I don't think there really  
18 is any longer after today any real disagreement about what  
19 the mental state requirements are between the parties. And  
20 so that will help us get that far.

21 And then with that jury instruction, that,  
22 Ms. Baggio, becomes sort of the clearest written statement  
23 of the government's position on, for example, U.S. person  
24 and the like, and then you know what you need to know for a  
25 substantive challenge, if you think you have one, as we

1 discussed earlier, that there's a fatal flaw in the  
2 indictment somehow. Does that make sense to you?

3 MS. BAGGIO: Yes, I understand what you're saying,  
4 Your Honor.

5 THE COURT: All right. So the 25th. Thank you  
6 very much.

7 I guess you'd call that a win, Mr. O'Connor. Is  
8 that your first win in federal court?

9 MR. O'CONNOR: It is. It's my first appearance in  
10 federal court.

11 THE COURT: All right. You're on a roll. You  
12 might want to quit now.

13 I have reviewed the motions in limine, and so on  
14 third-party acts, I think I'm comfortable with the current  
15 schedule. We are -- I'm going to think about that, though.  
16 It's very similar to the bill of particulars argument, in  
17 the sense of getting at the 801 statements. So I'll think  
18 about whether we need to advance that or not.

19 The motion in limine as to the emails raises a  
20 serious discovery issue. I don't view it as an issue that  
21 I'm going to resolve by in-limine preclusion of email now.  
22 What I do want to resolve is where we are on, first,  
23 providing all relevant emails; and, second, providing them  
24 in the format that looks like what we'll be using at trial.

25 I guess my first concern is that on page 2 you

1 suggest more emails are awaiting declassification.

2 MR. GORDER: Yes, Your Honor. As you will recall  
3 in the email motion, there is a -- Ms. Baggio points out  
4 that, you know, we provided in discovery certain emails that  
5 are replies to, you know, the previous email and didn't  
6 necessarily produce the previous email.

7 However, most often, I believe, the previous email  
8 is on the reply that was provided in discovery, but there  
9 may be some -- there apparently are some where she thinks  
10 they may not be.

11 So one of the things we've asked the FBI to do is  
12 to have those I would call original emails declassified.

13 And then there's some other emails that we've  
14 determined should be provided in discovery.

15 I'm not -- as of yesterday, the declassification  
16 process has not been finalized, and I guess I would hate to  
17 be pinned down as to exactly when that's going to happen.  
18 My experience is that unless things are emergencies, they  
19 take a while in Washington, D.C.

20 So what we are -- you know, we are moving as  
21 quickly as we can to get that material declassified and to  
22 the defense.

23 THE COURT: Are you seeking declassified emails  
24 that you want to use at trial or emails that you just think  
25 are relevant and therefore discoverable?



1 MR. GORDER: More the latter, Your Honor. There  
2 may be some that we would use in trial, but primarily this  
3 is more a discovery issue than a -- than actual emails that  
4 we want to use in trial. We haven't quite settled ourselves  
5 on what emails we will use in trial.

6 THE COURT: And then the second issue is that on  
7 several occasions in your response, you offered to provide  
8 what I'll just call clean copies, copies that will end up  
9 looking different for trial purposes than the copies that  
10 you've provided to the defense.

11 Now, sometimes I think that raises, in my mind, at  
12 least, very little concern that -- copies that will get rid  
13 of non-Roman numbers or letters, that doesn't concern me  
14 that much. But others raise more substantive issues, you  
15 know; for example, presence or absence of metadata.

16 MR. GORDER: Correct, Your Honor.

17 What our intentions are at this time -- let's  
18 just, for argument's sake, say that we're going to introduce  
19 30 separate emails for the jury. What we will do is produce  
20 what I call a clean copy of the email; in other words,  
21 without all the other extraneous things that may be on the  
22 emails that come from the FBI.

23 Generally I've had defense attorneys, for example,  
24 that complain if "secret" is crossed off rather than blacked  
25 out or whited out. And, you know, some of the other

1 material that the FBI adds when we print these things out in  
2 their system will be redacted so that the jury is going to  
3 get presumably what the authors and the recipients of the  
4 email themselves got.

5           With regard to the 30 emails -- just that many --  
6 we will print out and -- you know, there have been some  
7 problems with the printing process, you know. We  
8 acknowledge that. We will print out an email with the  
9 metadata that was received by the FBI from the ISP or  
10 whatever source we got the email from. Now, sometimes it  
11 has the IP address in the metadata, sometimes it doesn't.  
12 Part of that depends on how the email was accessed by the  
13 recipient or the sender, whether it was done through Outlook  
14 or done through the web. And I'm not a real technician on  
15 this, Your Honor. But we will be able to print out all of  
16 the metadata for the emails that we want to introduce that  
17 the FBI received. So --

18           THE COURT: You're talking about maybe three  
19 different things, and two of them don't create big problems.  
20 One I've already mentioned, that if you have these sort of  
21 random symbols and you get rid of them later, that's fine.

22           The second is that if you provided to the defense  
23 emails that have, you know, classification marks or other  
24 things from the FBI on them, and they now have those, and  
25 then in trial you just make clear that you're only going to

1 create an exhibit that is clean and doesn't have any of that  
2 on them, then that's fine also, because they today know what  
3 that exhibit mostly will look like. It will be the email  
4 without whatever the FBI added later.

5 The third is that you've described in your  
6 response that there are occasions where the method, whether  
7 stored email versus contemporaneous or other methods, the  
8 method of acquisition means that you do or don't get  
9 metadata. And you suggest that you in the future intend to  
10 produce emails with metadata that haven't yet been produced  
11 that way; in other words, new production.

12 MR. GORDER: Correct.

13 THE COURT: Tell me about that.

14 MR. GORDER: Well, when Mr. Knight and I sit down  
15 and we figure out these are the 30 that we want to introduce  
16 at trial, we'll ask the FBI to produce those, print them out  
17 with all the metadata on them so that we can provide that  
18 version to the defense.

19 THE COURT: What do you mean by metadata in that  
20 situation?

21 MR. GORDER: In other words, whatever the FBI  
22 received in the course of their collection from the ISP,  
23 let's say. In other words, if a particular email came from  
24 Yahoo and the FBI got it from Yahoo, we will be able to  
25 print out all of the -- whatever metadata Yahoo sent. That

1 can vary, depending again, as I understand it, on --

2 THE COURT: Why isn't that what you would have  
3 already provided in discovery?

4 MR. GORDER: Because there was some problems in  
5 the way it was printed out from the FBI's system. So it was  
6 just a printing problem, Your Honor.

7 THE COURT: So you intend to provide what may have  
8 been missing through that process --

9 MR. GORDER: Yes.

10 THE COURT: -- from the ISP to the defense as to  
11 the emails you intend to use as exhibits at trial?

12 MR. GORDER: Correct.

13 THE COURT: Thank you.

14 MS. BAGGIO: Your Honor, as to the motion in  
15 limine regarding email, I agree, based on the government's  
16 response and the way things have developed, it is premature  
17 in a way, because in them -- in the government providing the  
18 exhibits, as attached to its response, it makes clear to us  
19 that the government has access to essential information that  
20 we need now. And what we would say to the Court is that  
21 based on the government's response, that the Court should  
22 order that the government produce the email in a  
23 standardized format as electronically stored information to  
24 the defense.

25 THE COURT: What do you mean by that?

1 MS. BAGGIO: Yes, Your Honor.

2 When I review the government's explanation,  
3 whether the problem was missing fields of data or inaccurate  
4 characters or text that went off beyond the page, the  
5 government, upon my specific objection, was able to fix it.  
6 They were able to fix it by going back to whatever  
7 electronic version of that piece of evidence that they had  
8 and reproduce it in paper form to me.

9 This is a cause of great concern for me, Your  
10 Honor, because as set forth by my expert's declaration, the  
11 metadata is incredibly important for the defense to evaluate  
12 the email messages, not just the 30 that the government may  
13 want to introduce, but many of the others that are relevant  
14 to our investigation of this case, especially in a situation  
15 in which a lot of the email use happened through Internet  
16 service providers, so that a person could go to the library  
17 and log on to a Hotmail account or go to a grade school and  
18 log on to the same Hotmail account. And so the information  
19 is obtained not off the computer at my home, with an ISP  
20 address to my home, but instead there may be some important  
21 evidentiary information that can be derived from the IP  
22 addresses associated with different messages.

23 THE COURT: So can I pause you there for a moment.  
24 The government is saying two things about how metadata does  
25 or doesn't make it to you. One is that the method of

1 acquisition may affect how much metadata one gets, and so  
2 from the original source -- "original" means ISP -- you  
3 might get different fields or even different general  
4 information, depending on whether you're acquiring it, say,  
5 from stored email versus something more contemporaneous.

6 Are you seeking to have the government go  
7 backwards further than that in time in any way?

8 MS. BAGGIO: I believe, based on the government's  
9 exhibits, that's required, Your Honor, because it was  
10 represented to the defense previously, you have what we  
11 have. And --

12 THE COURT: Well, no, my question must not have  
13 been clear. I'm saying that if the government gets from  
14 Yahoo email in a certain form, are you seeking to have the  
15 government provide any information beyond what it got from  
16 Yahoo? And there may be something missing between what it  
17 got from Yahoo and what you eventually got. We'll talk  
18 about that in a second. But you're not seeking, are you,  
19 for the government to give you anything more than what it  
20 got from Yahoo?

21 MS. BAGGIO: You are correct. That is precisely  
22 what we're asking.

23 THE COURT: We're really talking about the  
24 government giving you something different than what it got  
25 from the ISP?

1 MS. BAGGIO: That is correct.

2 THE COURT: Whether through photocopying problems,  
3 printing problems, system problems, whatever it might be,  
4 you want those?

5 MS. BAGGIO: That's correct.

6 THE COURT: And if I'm clear on what you're  
7 saying, you want that for all emails?

8 MS. BAGGIO: That is correct.

9 THE COURT: For the reasons your expert outlined?

10 MS. BAGGIO: That is correct.

11 THE COURT: All right. Anything further on that?

12 MS. BAGGIO: Just, Your Honor, Mr. Gorder  
13 referenced they would include whatever the FBI got in its  
14 collections. And that's what we're asking for, Your Honor.  
15 I think based on the defense's specific objection to missing  
16 information, and the government's ability to provide it upon  
17 request, that tells me that they have access to information  
18 not yet provided to us.

19 Our government's -- our expert's declaration,  
20 rather, explains why that information is crucial, and I  
21 provided to the Court an additional email exhibit, which is  
22 marked Exhibit C-1 and C-2, that provide another example of  
23 upon specific defense objection to the emails provided in  
24 C-1, we were given information and told, "This is what we  
25 have," and then upon the Court's order for the government to

1 go back and reproduce it in Exhibit C2, all of the portions  
2 that are highlighted represent new content that was  
3 available to the defense based on the Court's order for  
4 reproduction.

5 So it wasn't simply adjusting a margin. There was  
6 substance that was omitted, based on the printing process.

7 And if we were able to have the information as the  
8 standardized format is -- as electronic -- as electronically  
9 stored information, that would avoid really the government's  
10 ability to give us the parts they want, whether  
11 intentionally or even because of the particular operator who  
12 is producing the messages. And I think it's just too  
13 important in a case like this, where the only evidence  
14 that's been disclosed to the defense of communications  
15 between Mr. Khan and Mr. Jaleel or Mr. Khan and Mr. Jaleel's  
16 wives are all in email. And therefore the evidence couldn't  
17 be more important to us doing our job.

18 THE COURT: Are you able -- are you deep enough  
19 into it where you and your expert are able to identify the  
20 remaining emails from which you seek further metadata, or is  
21 it simply that you want to make a blanket request?

22 MS. BAGGIO: I believe I referenced numbers in my  
23 original motion, Your Honor. Those were based on our best  
24 efforts to flag messages that were missing particular  
25 fields. So in that sense --



1 THE COURT: You've already done it?

2 MS. BAGGIO: I've already done it, that's correct.

3 THE COURT: All right. Thank you.

4 Yes, sir?

5 MR. GORDER: Your Honor, just two things: One,  
6 with regard to providing the defense with the electronic  
7 information in an electronic form, I've had several  
8 discussions with the FBI technical folks about that, and  
9 frankly I've been unable yet to confirm whether they  
10 consider the ESI version of the email still classified. The  
11 problem is that when they receive it from the ISP, it comes  
12 with some kind of electronic information that identifies the  
13 portal that the ISP sends it to the FBI, and that's a very  
14 sensitive piece of information. If they try to strip that  
15 out of the electronic version of the email, it will change  
16 what they call the hash value of the email and make it  
17 difficult to authenticate that this is the actual email that  
18 came from the ISP. So --

19 THE COURT: I'm going to pause you there for just  
20 a moment, then.

21 Do you know off the top of your head, Ms. Baggio,  
22 how many specific requests you've got on the table right  
23 now? Is it hundreds or dozens --

24 MS. BAGGIO: For emails? I'm sorry, Your Honor.

25 THE COURT: Yes. Are you talking about hundreds

1 of requests or dozens or how many are we talking about?

2 MS. BAGGIO: I believe with messages missing  
3 somewhere in the chain, it was around 166, and that was the  
4 largest batch. And then other flagged issues, as set forth  
5 in my briefing, whether it was missing fields of data or  
6 that sort of thing, I think those were more in the  
7 neighborhood of between 18 and 35.

8 And may I also say, there could be some overlap,  
9 too, one that is missing a message is also missing a field.

10 MR. GORDER: So just to finish up, Your Honor, I  
11 think we're limited at this point to just physically  
12 printing out the information as the best way to provide it  
13 to the defense.

14 THE COURT: Well, I guess that's what I was  
15 getting at. That's a fairly high number but not an undoable  
16 number to print out, and that, you know, in terms of  
17 changing the hash value, that allows you to print out and  
18 redact classified information that ultimately doesn't --  
19 wouldn't assist the defense, for example, in knowing anyway  
20 whether the log-on was at home or at a school or an Internet  
21 cafe.

22 And you've produced everything else, right?

23 MR. GORDER: Correct. I think the problem is, at  
24 least from reading the original motion, I mean, it doesn't  
25 identify -- it says there's like a hundred emails, and I

1 don't know which hundred we're talking about, which is why  
2 I've offered, you know, the 30 -- and again, that's just  
3 hypothetically -- that we want to introduce at trial, we're  
4 happy to print out. I don't want to require the FBI to go  
5 back and reprint everything unless it's absolutely  
6 necessary.

7 THE COURT: Well, I disagree that the limit ought  
8 to be what you intend to introduce at trial. Certainly  
9 there are other emails, or at least in doing their due  
10 diligence, without knowing for sure, the defense is entitled  
11 to learn some of the things it's learned already with some  
12 of the cleanup, presumably of some value -- at least that's  
13 the representation being made to me now, that some of this  
14 has been valuable in defense preparation.

15 So I am going to ask you, Ms. Baggio, to identify  
16 the further email -- the further emails from which you would  
17 like to receive a printed copy. What I'm going to assume is  
18 that getting a printed copy with purely classified  
19 information redacted effectively gives the defense what was  
20 received by the FBI.

21 And on that assumption, you're just making a  
22 request for printed copies of the emails, and that will be a  
23 couple hundred, right, something like that?

24 MS. BAGGIO: I would much prefer, Your Honor,  
25 electronic copies to avoid the problems that we have been.

1 And as the government has explained, sometimes we don't have  
2 a field because we don't have it, and sometimes we don't  
3 have a field because of the way they printed it. With that  
4 understanding, I can't know unless I have the electronic --

5 THE COURT: Well, let me do it this way, then. I  
6 understand the concern Mr. Gorder has raised, and what I  
7 don't want to do is cause deletion of classified fields to  
8 mess up what you get. So I'm requesting that the  
9 government -- I'm requesting you to submit to the United  
10 States -- you may already have done so -- the emails that  
11 you wish to receive in complete form that you think you  
12 haven't received yet in complete form. As I said, it sounds  
13 like that's a couple hundred maybe.

14 And I'm requesting the government to provide those  
15 emails in the form received from the source. That can be  
16 done in whatever way allows you to delete classified  
17 information.

18 So when you got something from Yahoo, it -- I  
19 guess from the source, the portal may have been on there  
20 indicated somehow, and you're allowed to delete that.  
21 Whether the only way to delete that is to print them with  
22 that page deleted, then that's what we'll have to do. If  
23 there's a way to do that electronically without messing up  
24 the email, you're free to do that also. But I'm requesting  
25 that you give to the defense the identified emails in the

1 form received by the FBI or any other agency from the source  
2 minus deleted classified information. We'll take it from  
3 there.

4 MS. BAGGIO: And may I make one request, Your  
5 Honor? Could I wait to provide my list until I'm given the  
6 new emails that I understand are coming? Because my reading  
7 of the government's response is they're trying to fix some  
8 of this already, and I don't want to ask them to do the same  
9 thing twice.

10 THE COURT: Yes. And so certainly what you appear  
11 to have already on the table is -- the entire email chain is  
12 a project you're already undergoing, right?

13 MR. GORDER: Correct, Your Honor.

14 THE COURT: That's fine.

15 I'm not going to put dates on this yet. You know  
16 my ruling.

17 And then, Ms. Baggio, Mr. Gorder, you'll let me  
18 know if I need to step in again to make this happen in a  
19 timely way.

20 Otherwise, I'm taking these issues under  
21 advisement. We have this email ruling and we have the  
22 timetable set on the jury instruction. And the other issues  
23 I'm going to think about some more and take under  
24 advisement.

25 Yes, sir?

1           Let me finish the under advisement thought. So  
2   it's going to take me a little while. I'm going to be  
3   missing from the district for a little while here upcoming,  
4   and then upon my return, shortly after that, in trial. So  
5   it may be -- it may be clear toward the latter part of this  
6   month -- I hope not, but possibly clear toward the latter  
7   part of this month before I can fully resolve the motions on  
8   the table today.

9           Mr. Knight?

10          MR. KNIGHT: I'm sorry, Your Honor.

11          The parties had discussed and we wanted to bring  
12   this to the Court's attention now while we're all here.  
13   Obviously we have a schedule that's sets forth deadlines for  
14   a number of issues. There is the outstanding motion  
15   relating to notice that has affected the timing of the  
16   filing of motions related to the Foreign Intelligence  
17   Surveillance Act.

18          THE COURT: Right.

19          MR. KNIGHT: The reason I bring that up today --  
20   the parties have discussed this -- is because of the  
21   sequence of events that takes place after the filing of  
22   those motions, that may put us past what is currently set  
23   for the deadline of the trial documents before we resolve  
24   those issues. So the parties are just looking at the  
25   calendar and --

1 THE COURT: We'll adjust that as necessary.

2 If I have this right, you've asked for a chance to  
3 brief this, in light of the letter from the government  
4 you've received, and you're where on that briefing?

5 MS. BAGGIO: I filed that on the 5th, Your Honor.

6 THE COURT: All right. I missed that. Thank you.

7 So you'll do what next?

8 MR. GORDER: Your Honor, we're waiting for you to  
9 make a ruling on the notice issue.

10 THE COURT: You don't intend to file anything  
11 further than just your letter?

12 MR. GORDER: No.

13 THE COURT: All right. I'll rule on that as  
14 quickly as I can, and then you'll know on the notice issue  
15 and that will start triggering the other motions you have in  
16 play.

17 MS. BAGGIO: That is correct.

18 And Your Honor, you had asked me originally, you  
19 said, once I rule on this, how long do you need. I think I  
20 quickly said two weeks. And I would just like to put on the  
21 record it depends on the Court's ruling, and of course if  
22 the Court were ultimately to decide that the government  
23 needed to provide some additional notice to the defense,  
24 then there would be additional time involved. So I just  
25 wanted to qualify my two weeks, that I'm not sure that I

1 would be able to get it done in two weeks. It would depend  
2 on what the Court said about the issue.

3 THE COURT: It depends, right? Isn't that the  
4 answer?

5 MS. BAGGIO: Yes, sir.

6 THE COURT: It depends. All right. I can live  
7 with that answer.

8 MR. GORDER: And, Your Honor, just, I guess, a  
9 request in the mode of a suggestion. When you rule on that  
10 issue, I think the parties and the people at the National  
11 Security Division that are interested in the Court's ruling  
12 would appreciate some kind of a written opinion or order  
13 rather than just a minute order, you know, kind of  
14 explaining your reasoning, if that's possible.

15 THE COURT: Thank you.

16 All right. We'll be in recess.

17 THE CLERK: This court is adjourned.

18 (Proceedings concluded.)  
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

12/5/2014

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE